IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ALAN GILL and DEBORAH GILL, Parents of MATTHEW GILL, a Minor,	)	
Plaintiffs,	)	
v.	)	No. 98-4192-CV-C-66BA-ECF
COLUMBIA 93 SCHOOL DISTRICT, et al.,	)	
Defendants.	)	

ORDER

Introduction

This case is brought pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400, et seq). Plaintiffs have also brought a claim for damages under the Rehabilitation Act, 29 U.S.C. § 794.

States that elect to receive federal funds under the IDEA must provide all disabled children with a "free appropriate public education." 20 U.S.C. § 1412(1). Each child's substantive education program must be defined by an annual Individualized Educational Plan (IEP) developed by the school district in consultation with the child's parents. 34 C.F.R. §§ 300.340-.345. The IEP must include: 1) a statement of the child's present level of educational performance; 2) a statement of annual goals, including short-term objectives; 3) a statement of specific special educational and related services, and the extent to which the child will be able to participate in regular educational programs; 4) dates of such services; and 5) appropriate objectives, criteria and evaluation procedures. *Id.*, § 300.346. Each child's IEP must be reviewed at least annually by the school district. 34 C.F.R. §§ 300.341-.345. The child must be re-evaluated at least every three years in conjunction with formulating the IEP.

If the child's special education program or placement defined in the IEP is disputed by the child's parents, a review procedure is available. 20 U.S.C. § 1415(a), (b), (d): 34 C.F.R.

§§ 300.500-.580. Dr. and Mrs. Alan Gill, the plaintiffs, challenged the March 21, 1997, IEP for their son, Matthew. The final administrative decision of July 15, 1998, has been appealed to this court. The parties have consented to this court's jurisdiction. The appeal is not a traditional appeal, but a modified de novo review of the administrative hearing decision below.

The motions before the court include the following:

(1) Plaintiffs' motion for partial summary judgment to reverse the decision of the administrative panel that Matthew was offered a free appropriate public education and that plaintiffs' due process rights were not violated, and for reimbursement of educational expenses, damages for violation of due process, and attorneys fees;

(2) Defendant Columbia 93 School District's motion for summary judgment to affirm the decision of the administrative panel that Matthew had been offered a free appropriate public education and that plaintiffs' due process rights had not been violated, and to reverse the determination of the panel that defendant school district owed plaintiffs reimbursement for ten hours per week one-on-one instruction;

(3) Defendant Missouri Department of Elementary and Secondary Education's motion to be dismissed from this action; and

(4) Plaintiffs' motion to enlarge the record.

An oral argument on plaintiffs' and defendant Columbia School District's motions for summary judgment was held on April 19, 1999. The court ruled at that time that this case covers only the 1997-98 and 1998-99 school years. The 1999-2000 school year is not included in this action. The parties were directed to meet and work out an appropriate plan for Matthew's 1999-2000 school year.

Statement of Facts

Matthew Gill was born in Montana on October 4, 1992, at 25 weeks of gestation. He weighed 1 pound, 11-1/2 ounces at birth. He was in intensive care for more than fourteen weeks, where he was intubated and on a ventilator for eighteen days. From April 1993 through April 1994, Matthew had gastrointestinal reflux. He was diagnosed with failure to thrive and had feeding difficulties which persisted through March 21, 1997. He had a developmentally delayed seizure disorder and several surgeries prior to March 21, 1997. (Tr. Vol. VI, 1529:17-1536:10).

Matthew was delayed in reaching developmental milestones. (Tr. Vol. VI, 1600:13-1601:2). He was able to sit up at age twenty months, to crawl at 25 months, and to walk at 28 months. Matthew did not, at any time during these proceedings, eat independently; he had to be fed by tube.

Matthew received a variety of services in Montana, including speech and occupational therapy. Before the Gills moved to Missouri, Mrs. Gill was in contact with the Missouri Department of Mental Health. Matthew began receiving services from the Missouri Department of Mental Health through the First Steps program immediately after the Gills moved to Missouri when Matthew was 26 months old. (Tr. Vol. VI, 1539:11-1545:5.)

Shortly after the Gills moved to Columbia, Missouri, in November 1994, Boone County Group Homes and Family Support assigned a caseworker, Judy Sides, to work with the family. In 1995, Ms. Sides referred Matthew to the Columbia Public Schools Early Special Education program. (Tr. Vol. VI, 1542:8-1543:16.) The Gills participated in parent training for Matthew's behavioral problems, and Matthew received speech and physical therapy. (Tr. Vol. VI, 1543:9-1545:5.) The services of Boone County Group Homes and Family Support continued to be available to Matthew and his family through March 21, 1997.

Matthew was evaluated at the Special Needs Clinic of the University of Missouri Hospitals and Clinics on April 3, 1995, when he was thirty months old. Carolyn Terry, M.D., noted Matthew's significant motor and speech delays, and thought that his expressive language delay, his deficits in social/adaptive behavior, and some of his mannerisms suggested a Pervasive Developmental Disorder, a type of autism. Dr. Terry felt it was unwise to diagnose autism at that time because Matthew was so young and he had no formal testing to confirm the diagnosis. (Jt. Exh. 30.) The Gills shared this information with Columbia Public Schools in the summer of 1995 during Matthew's evaluation for Early Childhood Special Education. (Tr. Vol. VII, 1806:24-180&:11.) On July 10, 1995, Dr. Terry noted that Matthew was showing progress with his physical therapist, his speech therapist, and in his social skills and communicative behavior. (CPS Exh. G4-1.) She did not diagnose Matthew as autistic and she told the Gills that the school district would not provide Matthew with a specific diagnosis for purposes of Early Childhood Special Education. (CPS Exh. G4 -1-2.)

The Columbia School District evaluated Matthew in the summer of 1995. Matthew participated in a Transdisciplinary Play-Based Assessment with help from his mother on July 20, 1995. The results of this assessment indicated that Matthew had a number of cognitive and developmental delays. (Jt. Exh. 32.) On September 22, 1995, the school district found that Matthew was eligible for Early Childhood Special Education services due to significant delays in cognitive skills, adaptive behavior, receptive/expressive language, and gross/fine motor skills. Under Missouri law, children under the age of six are not labeled with a disability diagnosis; they are simply determined to be eligible for early childhood special education. (Jt. Exh. 32; Tr. Vol. I, 63:7-13, 78:11-21, 80:2-15.)

On September 27, 1995, a team of individuals, including Dr. and Mrs. Gill; Karen Browning, an occupational therapist; Helen Kula, a speech therapist; Jackie Craig, a physical therapist; and Elaine Hartley, Matthew's classroom teacher, held a meeting to develop an IEP for Matthew (Jt. Exh. 10). Matthew's present level of performance for this first IEP was based on input from the IEP team, including the parents' observations, and the results of the play-based assessment and Mrs. Gill's responses to an interview about Matthew's use and understanding of language. Matthew's IEP included the following goals: 1) improve adaptive behavior skills, 2) improve pre-academic skills, 3) participate in a developmental motor skills program, 4) improve receptive and expressive language skills, 5) improve fine motor function in school and self-care activities, and 6) increase oral feeding. Objectives were established for each goal. (Jt. Exh. 25.) Plaintiffs did not appeal that IEP.

Matthew was placed in a self-contained classroom on October 4, 1995, his third birthday. He attended school for three half days, nine hours, per week. The classroom was very structured and the class followed a predictable routine, an environment designed to help Matthew meet the goals and objectives of his IEP. Matthew was very uncomfortable with the classroom environment at first and he needed substantial assistance with classroom routines. He was also uncomfortable relating to staff and his classmates. (Tr. Vol I, 271:12-19, 275:7-15, 277:8, 286:10-16; Vol. VII, 1771:20-1772:5.) Matthew made progress toward his IEP goals during the school year. His adaptive behavior improved as he became more cooperative with removing his coat and putting it up and washing and drying his hands. (Tr. Vol. I, 277:16-278:23.) Matthew's

participation in pre-academic activities increased by working one-on-one with his speech and physical therapists and his teacher (Tr. Vol. I, 278:24-280:5). He began to follow classroom routines and became able to function more independently. His attention span increased. Matthew progressed toward his goal of oral feeding by handling and placing food to his mouth during snack time. (Tr. Vol I, 278, 280-81, 283; Vol II, 1747, 1767-68, 1815-17.) Mrs. Gill noted that Matthew's attention span had increased, he was willing to do activities he had not been willing to do before, his oral defensiveness had decreased and he had begun to put food items into his own mouth (CPS Exh. D12, p.110). Matthew was having behavior problems at home during this time but this was not shared with the school district (CPS Exhs. D-12, G4-5; Vol. I, 314-17). The Gills did not express any complaints with Matthew's 1995-96 IEP at the IEP meeting or throughout the school year.

Matthew attended the Extended School Year program during the summer of 1996 to retain his level of performance from the previous school year. All skills were maintained. (Jt. Exh. 23.)

In August 1996, Dr. Terry saw Matthew again. At that time, she recommended that the Gills have definitive psychological testing done to determine whether Matthew had a pervasive or autistic disorder and to determine Matthew's current cognitive level. (CPC Exh. D15, 114, 116.) Dr. Terry did not diagnose autism or pervasive developmental disorder not otherwise specified. Both parents testified that Dr. Terry told them that giving Matthew a diagnosis would not change anything they were doing for Matthew. (Tr. Vol. V 1212-13; Vol. VIII 2103-04.)

Matthew was placed in a self-contained Early Childhood Special Education classroom at Field School (he was later moved to Blue Ridge School because of building constraints) for the 1996-97 school year. An IEP meeting was held on September 11, 1996. Attending this meeting were: Dr. and Mrs. Gill; Melissa Sandbothe, coordinator for Early Childhood Special Education; Susan Blackburn, speech pathologist; Jackie Craig, physical therapist; Karen Browning, occupational therapist; Janet Ancell, occupational therapy student; and Ms. Goebel, the substitute teacher for Ms. Kammerich, Matthew's classroom teacher who was unable to attend. (Jt. Exh. 22.) Mrs. Gill requested transportation for Matthew and those arrangements were made (Tr. Vol. VI, 1599-1600). The team agreed on Matthew's present level of assessment and determined that

Matthew had met the following objectives: remove front-opening coat or sweater and place it in cubby with assistance; cooperate in washing and drying hands; participate in snack time; and use either hand to place five small toys in open container. Matthew was to continue to work on: following classroom routine with assistance; participate in developmental motor skills program; participate in vocal play paired with hand/finger movements; respond to questions using head shake for yes/no response; use "mommy," "daddy," and "Andrew" correctly for family members; and increase oral feeding. The team reported that three goals would be dropped: participate in various activities designed to encourage exploration of new toys, materials, and objects in the environment; receptively demonstrate understanding of three different names of school staff/students; and increase expressive vocabulary by consistent use of six new words. New goals were agreed upon by the team: increase skills to maximize learning; increase independence in self-care, play and pre-academic fine motor skills; promote continued development of gross motor skills; and improve communication skills. For 1996-97, Matthew would attend school for four half days a week and would receive related services in the areas of occupational therapy (45 minutes per week), physical therapy (15-30 minutes per week), and speech therapy (60 minutes per week). (Jt. Exh. 22.)

In September 1996, Matthew's classroom teacher noted that he would not sit at circle time and would not participate in functional play; he squealed loudly, refused to stand up on his own, and refused to look for his name on the visual schedule; he was not aware of the other children; he ran around in physical education class; he watched lights; he would not acknowledge a person calling his name; he said "mom," "dad," "up," and sometimes "no;" he used signs for "more," "enough," "book," and "music" (Jt. Exh. 65; Tr. Vol. I, 350-54). By December 1996, Matthew sat without assistance, pulled his name out of a pocket chart and put it in a basket, modeled actions of other children, sat for ten minutes to participate in an activity, sat on the blue line in physical education class, and looked at the teacher or smiled at the teacher after hearing his name. He began to follow directions with some prompting and his eye contact was improving. Matthew voluntarily participated in gross motor group activities; in speech, he was beginning to follow directions with some prompting; and his use of eye contact was improving. (Jt. Exh. 65, p.210; Tr. Vol. I, 345-48.) During an evaluation for music therapy outside of school, Matthew

demonstrated that he knew his colors and could pick out the correct colored ball when asked (CPS Exh. F2, p.176).

In December 1996, the psychological evaluation recommended by Dr. Terry in July 1996 was performed on Matthew. At that time, Matthew was four years and one month old. Ellen Horowitz, Ph.D. Psychology, performed the assessment. Dr. Horowitz observed that when Mrs. Gill was in the room and Matthew seemed calmer, he was exploring the room; he was interested in a wall plug and a plastic ruler, and he climbed on chairs and the table. She determined that by history or current observation, Matthew's behaviors were consistent with a diagnosis of Pervasive Developmental Disorder Not Otherwise Specified, a form of autism. Matthew was not able to perform tasks in a structured testing situation. He was at a 20 to 24-month level in motor skills, a ten-month level in daily living skills with a lowered score due to tube feeding, and a 16-month level in communication and socialization. Dr. Horowitz noted that programs such as the Wisconsin Early Autism Project, which the Gills had decided to pursue for Matthew, could be of tremendous benefit to children with Pervasive Developmental Disorder Not Otherwise Specified. (Jt. Exh. 40.)

Autism is a neurological disability. It is a spectrum disorder, which affects each child differently in terms of mental abilities, sensory problems, and communications. (Tr. Vol. III, 916-17.) The symptoms of autism are also characteristic of other disorders and there is no objective biomedical marker to identify autistic individuals (Tr. Vol. VIII, 2251). There is no cure for autism, but it is manageable using behavioral and educational interventions. The techniques available to educate children with autism are also useful for educating children with other developmental delays. (Tr. Vol III, 815-16.) One such treatment program is Applied Behavior Analysis (ABA) used by O. Ivar Lovaas, Ph.D., at the University of California-Los Angeles. This program focuses primarily on the use of discrete trial training (DTT), a series of short, discrete lessons one-on-one with a student taught with very clear beginnings and endings, repeated over and over, with positive reinforcement. DTT can be provided at school and at home. (Tr. Vol. III 892, 920.) Plaintiffs contend that the Lovaas program is far superior to all other programs. Defendants disagree and contend there are many methods and techniques that have proved successful in treating children with autism. These include sensory integration and

supports, structured classrooms, instruction in language through functional and meaningful situations, and involvement in social skills and social supports. (Tr. Vol III, 919-20.)

At the end of December 1996, the Gills hired a private therapist to run an extensive one-on-one program based on the Lovaas, discrete trial training method in their home. They did not consult with the school district beforehand. On December 30, 1996, Mrs. Gill told Matthew's classroom teacher that they were going to try a new home therapy. (Tr. Vol. I, 354-56.) In early January, Matthew's private speech and occupational therapists noted that he was making progress with significant progress in some areas. (CPS Exh. G3, p.231; Tr. Vol. VII, 1888-89.) Matthew began working at home with Craig Thomas in mid January 1997 (Tr. Vol. VI, 1448-50, 1457-58). On January 21, 1997, the Gills unilaterally removed Matthew from attending school on Thursdays (Tr. Vol. I, 359).

By February 1997, Matthew independently interacted with other children at school, followed simple teacher instructions, was able to generalize his colors, was willing to explore food, and was able to adhere to classroom routine by independently sitting in his assigned chair during snack time (Tr. Vol I, 339-41). He was, at that time, attending school three mornings per week.

In February 1997, the Gills requested a new IEP for Matthew (Tr. Vol. I, 359). On February 4, 1997, Mrs. Gill informed Melissa Sandbothe that Matthew had been diagnosed with PDD in August of 1996 (Tr. Vol. III, 817-19). Matthew missed several Mondays of school in January and on February 25, 1997, the Gills unilaterally removed Matthew from attending school on Mondays. As a result, Matthew was attending school only two half days per week. (Tr. Vol. I, 361; Vol. VI, 1675-76.) On February 24, 1997, the Gills formally requested that the school district fund their ABA program with the Childhood Learning Center in Reading, Pennsylvania, which included 35 hours of one-on-one instruction by trained instructors at an expected cost of $1,200 to $1,400 per month; eventual placement in the early childhood program with normal children for three half days a week with an ABA trained aide in attendance; some occupational therapy services; and leaving Matthew in his present classroom two half days per week until the end of the 1996-97 school year (Jt. Exh. 59).

On March 4, 1997, the IEP team met. In attendance were Dr. and Mrs. Gill; Dr. Kim Ratcliffe, Director of Special Education; Melissa Sandbothe; Laura Kammerich; Karen Browning, occupational therapist; Susan Blackburn, speech therapist; and Jackie Craig, physical therapist. Ms. Kammerich, Matthew's classroom teacher, and Ms. Blackburn, his speech therapist, have had previous experience working with autistic children and have attended workshops on autism. (Tr. Vol. I, 322-26; Vol. III, 680, 682, 685-89.)

Matthew's level of performance at that time indicated some progress in following verbal directions, being aware of his surroundings and peers, using some signs consistently, following one-step directives, and sitting independently for ten minutes, but in many areas Matthew still needed verbal and physical prompts (Jt. Exh. 17). At the meeting, the Gills told the team that Matthew had been diagnosed as autistic in August 1996 and they asked the school district to fund the home program they had started in January. The meeting was continued to a later date so that the school district could consult with Julie Donnelly, Ph.D., an autism consultant for the state. (Tr. Vol. I, 86-89.) After the March 4, 1997, meeting, the Gills provided Matthew's teachers with a typewritten list of goals and objectives that they wanted included in Matthew's IEP (Jt. Exh. 65).

Dr. Donnelly was in Columbia on March 20, 1997, to advise the district on practices for teaching autistic children. On that day, she visited with the Gills in their home. She did not evaluate Matthew, although she did see him. (Dr. Donnelly has an adult autistic child.)

The IEP team, including Dr. Donnelly, reviewed information the Gills had provided and their proposed goals on March 20, 1996, in preparation for the continuation of the IEP meeting scheduled for the next day. They attempted to include each of the Gills' proposed goals in the draft Goals and Objectives. (Tr. Vol. III, 244-45, 904-10).

The continuation of the March 4, 1997, IEP meeting was held on March 21, 1997. All the same persons attended with the exception of Melissa Sandbothe, and they were joined by Dr. Donnelly. The Gills confirmed their agreement with Matthew's present level of performance developed on March 4, 1997. (Parents' Exh. 20, p.1.) Matthew had been making some real progress in both home and school programs by that time. The draft goals and objectives were

discussed and revised (Parents' Exh. 20). The March 21, 1997, IEP goals are set out in Appendix I.

The Gills rejected the IEP and made a second request for funding their home program. Dr. Ratcliffe proposed a more intense program at school of four full days per week: three hours each morning in the Early Childhood Special Education class; one and one-half hours of one-on-one during the break between morning and afternoon sessions, including lunch time; and a three-hour afternoon session in a reverse mainstream class with normally developing peers. (Tr. Vol. VIII, 2257-59.) There were to be periods of one-on-one discrete trial training throughout the day to "prime" Matthew and help him be ready to participate in group activity (Tr. Vol. IV, 1050-51). Defendants also proposed to hire another aide, in addition to the aide already in the classroom, to be available to do one-on-one activities with Matthew or to relieve the classroom teacher to work one-on-one with him (Tr. Vol. I, 93; Vol. III, 912; Vol. VIII, 2259). Matthew would receive, each week, ninety minutes of speech and language therapy, 45 minutes of occupational therapy, and thirty minutes of physical therapy (Jt. Exh. 17). The proposed IEP would entail 35 hours per week: 8-9 hours would consist of specified one-on-one time and related therapy services; and there would be additional one-on-one time with Matthew throughout the day, especially within his Early Childhood Education Class which comprises twelve hours per week. Under the proposed IEP, Matthew would receive at least six to nine hours of one-on-one time per week, which includes the midday one-on-one time and speech, physical and occupational therapy sessions, and he might have received as much as twenty hours of dedicated one-on-one time. This plan was scheduled to be implemented starting March 25, 1997, and run through March 1998.

The Gills declined the proposed IEP in favor of their home-therapy program and two half day sessions through the public school, including two and three-quarters hours of related therapy services. The Gills began the administrative review procedure which resulted in this case.

The record indicates that Matthew made slow progress from October 1995 through December 1996, although the record indicates some more significant improvements in the fall of 1996 and early 1997. Prior to the fall of 1996, it did not seem to matter whether the program was run by the school or Matthew's parents. There was some progress, however, as noted by Matthew's parents, teachers, doctors, and speech, occupational, and physical therapists during this

time. Matthew then made significant progress in developing meaningful vocabulary during the three months of his one-on-one discrete trial training at home in early 1997. However, when Matthew's Early Childhood Special Education was reduced by the Gills from four half days to two half days, Matthew regressed in his functional play and social interaction, and his self-stimulatory behavior increased. (Jt. Exh. 17.)

The programs administered by both his parents and the school prior to 1997 resulted in very limited progress, but the evidence did not clearly disclose whether the progress remained slow because of developmental delays or for other reasons.

Standard of Review

1. Summary Judgment

Summary judgment is appropriate where no genuine issue of material fact is present in the case and judgment should be awarded to the moving party as a matter of law. *Buford v. Termayne*, 747 F.2d 445, 447 (8th Cir. 1984). If the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1280 (8th Cir. 1996). The nonmovant must substantiate his allegations with enough probative evidence to permit a finding in his favor based on more than mere speculation or conjecture. The "mere scintilla" of evidence is insufficient to avoid summary judgment. *Moody v. St. Charles County*, 23 F.3d 1410, 1412 (8th Cir. 1994).

Summary judgment is an appropriate tool in IDEA matters. *Breen v. St. Charles RIV School Dist.*, 25 IDELR 1195 (E.D. Mo. 1997), *aff'd*, 141 F.3d 1167 (8th Cir. 1998).

2. IDEA Review

The court's review of an IDEA administrative proceeding has been described as a "modified *de novo* review." Murray v. Montrose County School Dist. RE-1, 51 F.3d 921, 927 (10th Cir. 1995), *cert. denied*, 516 U.S. 909, 116 S. Ct. 278 (1995) (citing *Doe v. Board of Education*, 9 F.3d 455, 458 (6th Cir. 1993), *cert. denied*, 511 U.S. 1108, 114 S. Ct. 2104 (1994)). This court is to make an independent decision of the issues based on a preponderance of the evidence, giving due weight to the state administrative hearings. The level of deference accorded to state proceedings is less than required under the substantial evidence test commonly applied in federal administrative law cases, but consideration should be given to the fact that the

state hearing panel has had the opportunity to observe the demeanor of the witnesses. The court may not substitute its own notions of sound educational policy for those of the school authorities which it reviews. *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1840 (1998).

3. Burden of Proof

At the administrative level, the school district had the burden of proving that it complied with the IDEA. *E.S. v. Independent School Dist. No. 196*, 135 F.3d 566 (8th Cir. 1998). In their appeal from the administrative decision, plaintiffs have the burden of challenging the outcome of the proceedings below. *Id.*, 135 F.3d at 569. The burden of proof lies with the plaintiffs as the party attacking the IEP. *See Fort Zumwalt School Dist. v. Missouri State Bd of Educ.*, 923 F. Supp. 1216, 1229 (E.D. Mo. 1996), *reversed and remanded on other grounds sub nom., Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1840 (1998).

4. Standard for an Appropriate Education

Congress provided limited resources to the states to implement the policy of educating all disabled students, and the sufficiency of that education must be evaluated in light of the available resources. *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997); *cert. denied*, ___ U.S. ___, 118 S. Ct. 1840 (1998); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 164 (8th Cir. 1987); *Board of Educ. v. Rowley*, 458 U.S.176,179-81, 102 S. Ct. 3034, 3049 (1982). IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense. *Fort Zumwalt v. Clynes*, 119 F.3d at 612; *Rowley*, 102 S. Ct. at 3049. The statute requires that a public school provide sufficient specialized services so that the student benefits from his education. *Fort Zumwalt v. Clynes*, 119 F.3d at 612; *Rowley*, 102 S. Ct. at 3045. The goal of IDEA is more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside. *Fort Zumwalt v. Clynes*, 119 F.3d at 612; *Rowley*, 102 S. Ct. at 3043. In articulating the standard for a free appropriate public education, the *Rowley* court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." Congress expressly recognized that in many instances the process of providing

special education and related services to handicapped children is not guaranteed to produce any particular outcome. *Rowley*, 102 S. Ct. at 3043.

Missouri Revised Statutes § 162.670 contains the following "Statement of Policy" as a preamble to the statute:

> [I]t is hereby declared the policy of Missouri to provide or to require public schools to provide to all handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, special education services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children.

This is specifically denominated as a statement of policy. It is settled law in Missouri that the preamble of a statute cannot enlarge the scope of the statute, and it can only be resorted to for explanation when the language of the enacting clauses is obscure or ambiguous. *Doemker v. City of Richmond Heights*, 18 S.W. 2d 394 (1929); *Lelly v. City of Richmond Heights*, 18 S.W.2d 401 (1929); *Lackland v. Walker*, 151 Mo. 210, 52 S.W. 414 (1899). In *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040 (1989), the United States Supreme Court found it was inappropriate for the federal court to address the meaning of a preamble to a Missouri state statute. *Id*. at 3050.

No federal court in Missouri has adopted the "maximize the capabilities" standard of the policy statement of section 162.670 of the Missouri statutes as the legal standard to be used in IDEA cases. The "educational benefit" standard in *Rowley* has been the standard applied by the Eighth Circuit in determining free appropriate public education. *See Fort Zumwalt v. Clynes, supra; Yaris v. Special Sch. Dist. of St. Louis County*, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd* , 728 F.2d 1055 (8th Cir. 1984); *Foley v. Special Sch. Dist. of St. Louis County*, 927 F. Supp 1214 (E.D. Mo. 1996); *Breen v. St Charles R-IV Sch. Dist.*, 25 IDELR 1195 (E.D. Mo. May 16, 1997), *aff'd*, 141 F.3d 1167 (8th Cir. 1998).

The decision in *Cothern v. Mallory*, 565 F. Supp. 701 (W.D. Mo. 1983), addressed the issue of whether the Missouri statutes required a higher standard than the federal appropriateness standard. Judge Wright determined that it was not necessary to decide that question because the IEP in question met the student's needs and maximized his capabilities. The court notes that *Cothern* was decided thirteen years ago. The recent case of *Blackmon v. Springfield R-XII School District*, No. 97-3490 (W.D. Mo. Dec. 4, 1998) makes note of the Missouri policy statement, but

defers to the federal standards of what constitutes a free appropriate public education. The Eighth Circuit has consistently applied the *Rowley* standard to determine what constitutes a free appropriate public education in Missouri, and this court will follow the same approach.

Discussion

The purpose of the IDEA is to assure that all handicapped children have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. Related services include transportation and developmental, corrective, and other supportive services, which include speech, occupational and physical therapy.

Parent involvement is a crucial component in the development of an IEP that provides a free appropriate public education. Plaintiffs Dr. and Mrs. Gill are commended for their continuing involvement in seeking what they believe to be the best possible education for their son, Matthew. They have sought therapy options for Matthew from the time of his birth. They have pursued many educational opportunities for him, both public and private. When it became clear that Matthew had Pervasive Developmental Disorder Not Otherwise Specified, they did extensive research to find a program which they felt would best meet Matthew's educational needs.

Plaintiffs' strong belief that their Lovaas-based program is the best and only suitable program for Matthew is what brings them before this court. They believe that Lovaas-based extensive one-on-one instruction is the only appropriate education for Matthew and that the IEP program offered by defendant school district is not appropriate because Matthew is capable of much greater advances than could be obtained through the school-offered program.

It is clear that Lovaas-based one-on-one instruction is an appropriate program for Matthew. In order to prevail in this case, however, plaintiffs have the burden of proving that the program offered by the school district in the March 1997 IEP was not reasonably calculated to confer an educational benefit to Matthew. This they have not done.

For the school year 1995-96, and the beginning of the 1996-97 school year, Matthew made educational progress both at school and in the private therapy programs in which he participated. Plaintiffs and Matthew's teachers and doctors all, at various times, commented positively about

Matthew's progress. It is important also to note that during this crucial developmental period, it was unclear whether his slow rate of progress was due to his severe developmental delays or to something else, such as an inappropriate educational program. When Matthew received psychological testing in December 1996, the suspected diagnosis of Pervasive Developmental Disorder Not Otherwise Specified was confirmed. Matthew's parents began a home-therapy program based on the Lovaas ABA method in January 1997 and Matthew began to make steady progress. It is tempting to believe that Matthew's progress was attributable solely to the use of the Lovaas-based instruction, but in Matthew's case, where severe developmental delays are a factor, the question arises whether Matthew finally had the developmental maturity to begin making more progress.

It is clear from the evidence that Matthew responds well to one-on-one discrete trial training. From mid-January through March 1997, Matthew was able to markedly expand his vocabulary because that skill was emphasized in his home-based one-on-one instruction. However, during the same period, Matthew had been pulled out of school two days a week to accommodate his home-based program. At school, Matthew regressed in his functional play and social interaction, and his self-stimulatory activity increased. Whether Matthew should progress dramatically in one skill, to the detriment of others, or whether he should be pushed to progress in a broad spectrum of skills, but at a slower pace in each, is an educational policy decision that this court is not supposed to, or prepared to, make. To be successful in school, it is important for Matthew to be able to communicate well, but it is also important for him to learn to interact socially, to participate in functional play, and to learn alternatives to self-stimulatory behavior, and these were areas where Matthew had made progress in the public school program, and which were offered as part of the disputed 1997 IEP.

Had the school district proposed the same type of educational program for Matthew for the remainder of 1997 and for the 1997-98 school year as they had offered him in prior years, after they were aware of his diagnosis of autism and had been supplied with the educational information compiled by plaintiffs, that IEP may not have been an appropriate public education. The IEP offered Matthew in March 1997 was radically different from the program he had been offered previously, however. It contained substantially more one-on-one instruction, required hiring an

additional teacher assistant for Matthew's class, and continued an emphasis on a broad spectrum of skills necessary for Matthew to be integrated with the regular classroom.

Plaintiffs list five areas where they believe the proposed IEP fails to provide Matthew with a free appropriate public education: 1) trivial speech/ language/ communication skills; 2) amount of one-on-one direct instruction unspecified; 3) inappropriate, inconsistent "patchwork" of placements; 4) more of the same failed methods and curriculum; 5) curriculum not tailored to Matthew's needs, which plaintiffs contend is that tasks be presented in a structured, adult-led, discrete trial training format.

Plaintiffs, in their first point, believe that the communication goals set for Matthew are trivial. Plaintiffs claim that Matthew was only expected to learn ten words during the school year. However, ten words was not the annual goal, although the IEP was not a model of clarity. The goal was to work on ten words at a time and when mastered, to move on to another ten. The March IEP sets forth communication goals that are consistent with successful school adaptation. They are not limited to increasing spoken vocabulary. Communication is crucial for educational success, but communication is much more than whether a child can articulate a specific word. The proposed IEP is geared to providing the types of communication skills the school district believes Matthew will need to function successfully in an educational environment, and is not clearly an inappropriate goal or inferior to the program proposed by plaintiffs. The evidence indicates that Matthew was removed from the school environment to focus on increasing his articulated vocabulary. When this happened, his functional play and social interaction at school, both necessary communication-based skills, regressed. The communication goals of the March 27, 1997, IEP, as supplemented by plaintiffs, were calculated to provide Matthew with educational benefit.

Plaintiffs argue that the IEP is inappropriate because the amount of one-on-one direct instruction is not specified. By its nature, an IEP lacks specificity so that many different methods and techniques can be used to meet a child's specific educational needs and goals. All parties agree that Matthew benefits from one-on-one instruction, and the IEP does specifically set forth six hours a week as one-on-one time with Matthew. It includes related services in speech, occupational and physical therapy for approximately three hours per week. The IEP also

specifically calls for frequent periods of one-on-one time during the school day. The IEP is not inappropriate because it does not specify every hour of one-on-one time with Matthew; it is not required to do so. What the parents object to is the fact that the IEP does not specify the number of one-on-one hours that they believe Matthew must have. The administrative panel recognized plaintiffs' concern about exactly how many hours of one-on-one Matthew would be receiving, so they ordered the school district to reform the IEP to include ten specific one-on-one hours, in addition to those already specifically mentioned. That would have brought the total one-on-one time to at least sixteen hours weekly. The court notes that the administrative panel did not order a revision of the IEP, but a reformation, that is a rewording, of that document. The administrative panel found that the March IEP specifically includes at least sixteen hours of one-on-one time and that those hours must be specified in the IEP document. The IEP actually includes anywhere from sixteen to twenty hours of one-on-one instruction for Matthew each week, including lunch time, the ten hours noted by the administrative panel, and speech, physical, and occupational therapy. The court recognizes that the IEP probably includes more one-on-one time because the Early Childhood Special Education program of necessity includes one-on-one activities with each of the students. The March 21, 1997, IEP includes a significant amount of one-on-one instruction which is specifically calculated to provide Matthew educational benefit.

Plaintiffs' third point is that the IEP is not appropriate because it represents an inconsistent "patchwork" of placements. Plaintiffs would prefer intensive adult-led one-on-one instruction for Matthew for most of the day. The IEP does not offer that type of program. Instead, the IEP offers a structured classroom-based curriculum with significant one-on-one instruction for Matthew within that environment. Under the IDEA, the school district must work at integrating Matthew into the school environment. To do that, they must make sure that Matthew has all the skills to function within that environment. It is documented that Matthew has learned to adapt to the classroom environment and that he can function and participate in school-type activities. This is not a case where the child is nonfunctional at school. The "patchwork" of placements of which plaintiffs complain are, in fact, discrete placements designed to meet Matthew's specific educational needs. The March IEP offers several instructional environments geared specifically to Matthew's educational needs and was calculated to provide him with educational benefit.

Plaintiffs' fourth point is that the March 21, 1997, IEP offers more of the same failed methods and curriculum as Matthew's previous IEP's. The court notes that even though Matthew made minimal educational gains under his previous IEP's, he did receive some educational benefit. There is also some question whether Matthew's slow progress prior to 1997 was a function of the educational methods used or Matthew's substantial developmental delays and learning readiness. The March 21, 1997, IEP was substantially different from the previous programs offered to Matthew. His in-school time was increased from twelve hours per week to 35 hours per week. He was to receive at least sixteen hours of dedicated one-on-one instruction during that time. One significant factor in this case is that plaintiffs chose not to implement the IEP offered by the school district. Plaintiffs' evidence that the Lovaas one-on-one program would have been better is not sufficient to persuade this court that the program offered would not have provided substantial benefit to Matthew. The expanded IEP offered Matthew in March 1997 was significantly different from his previous educational programs and was specifically calculated to provide him, as a child with autism, educational benefit.

Plaintiffs' fifth point is that the curriculum was not tailored to Matthew's needs. It is clear from the evidence that the school district took extra measures to make sure that the March 1997 IEP was specifically tailored to Matthew's needs, including calling in an autism expert as a consultant. His entire program was revised to meet Matthew's special needs as an autistic child. The amount of one-on-one discrete trial training was greatly expanded. Matthew was to spend part of his day with normally developing peers. The school district adjusted Matthew's communication goals to more closely reflect those identified by plaintiffs. Matthew learns well using discrete trial training. Plaintiffs rely on the Lovaas studies to dispute the effectiveness of less than thirty hours of one-on-one instruction. At the time the IEP was being prepared, the Lovaas program was not accepted in the educational community as the only sound method of educating autistic children. Other educational approaches were endorsed by educational experts who testified. The evidence indicates that Matthew learned certain things in the classroom. Substantial one-on-one instruction was included as a part of the program offered to Matthew. The March 1997 IEP was designed to meet Matthew's individual needs. It is not inappropriate merely because it is did not provide 30 to 35 hours of intensive one-on-one Lovaas-type instruction upon

which plaintiffs insist. Sixteen to twenty hours of one-on-one instruction, coupled with fifteen hours of other types of education, was designed to provide Matthew with meaningful educational benefit. Thirty-five hours of one-on-one instruction might be better, but the school is not required to provide the best possible education. The dispute between the experts about whether the Lovaas method or other approaches to educating children is better is a matter of educational policy which this court is not inclined to resolve.

Parental preferences must be taken into consideration in deciding IEP goals and objectives and in making placement decisions, but parental preference alone cannot be the basis for compelling a school district to provide a certain educational plan. *Brougham v. Town of Yarmouth*, 823 F. Supp. 9, 16 (D. Me. 1993). Parents, "no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific methodology in providing for the education of their handicapped child." *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925, 109 S .Ct. 308 (1988).

A parent's objection to an IEP does not render it less viable, as long as the IEP is sufficient to provide a free appropriate public education. *Rouse v. Wilson*, 675 F. Supp. 1012, 1017 (W.D. Va. 1987). When determining the standard for a free appropriate public education, the courts in Missouri have consistently applied the educational benefit test set forth in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

The IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense. *Fort Zumwalt v. Clynes*, 119 F.3d at 612; *Rowley*, 102 S. Ct. at 3042. The statute requires that a public school provide sufficient specialized services so that the student benefits from his education. *Fort Zumwalt v. Clynes*, 119 F.3d at 612; *Rowley*, 102 S. Ct. at 3045. In articulating the standard for a free appropriate public education, the *Rowley* court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." *Rowley*, 102 S. Ct. at 3043.

The IDEA also requires that handicapped students be educated in the least restrictive environment possible. 20 U.S.C. § 1412(5). Federal law requires that states educate disabled and nondisabled children together "to the maximum extent appropriate" and that "special classes, separate schooling, or other removal of children with disabilities from the regular educational

environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . ." *Id*. In Missouri, the mainstreaming requirement means placement of disabled students with nondisabled students whenever possible. *Fort Zumwalt v. Clynes*, 119 F.3d at 612; *see* Mo. Rev. Stat. § 162.680. Plaintiffs' in-home program is not the least restrictive environment for Matthew. Evidence in the record indicates that Matthew continued to progress each school year while he attended Early Childhood Special Education. He was able to adapt and function in the classroom and to develop skills needed to succeed in school. The March 1997 IEP provides for both Early Childhood Special Education and reverse mainstreaming with normally developing children in the least restrictive environment possible.

The IEP offered on March 21, 1997, which offered more intensive services than were previously offered and a substantial amount of additional one-on-one instruction, was reasonably calculated to confer further educational benefit to Matthew in the least restrictive environment. It was geared to Matthew's needs for more one-on-one instruction, and the development of functional communication skills, socialization skills, pre-academic skills and self-care skills. The March 21, 1997, IEP represented a free appropriate public education for Matthew.

During the oral argument on April 19, 1999, plaintiffs suggested that Lovaas-based one-on-one discrete trial training is a compensable related service for autistic children in that it prepares them to be able to learn in the school environment. The March IEP included a significant amount of one-on-one discrete trial training, which all parties agree could be done either at home or at school. Since these services were already included in the IEP offered to Matthew, they are not separately compensable.

Plaintiffs unilaterally changed Matthew's placement. They started their private home program and removed Matthew from two days of his in-school program before they asked to meet and discuss a change in Matthew's placement. In Missouri, parents seeking reimbursement for the unilateral placement of a child in a private school setting must first meet the threshold test articulated by the Eighth Circuit in *Evans v. District No. 17 of Douglas County, Nebraska*, 841 F.2d 824 (8th Cir. 1988), and followed in *Fort Zumwalt v. Clynes*, 119 F.3d at 614. The parents must make clear to the district that they want the district to "initiate" a change in placement.

Evans, 841 F.2d at 829. In *Fort Zumwalt v. Clynes*, the parents removed their child from his school and enrolled him in a private school before the school district had an opportunity to review the child's IEP and attempt to come to an agreement with them. That is the case here. Plaintiffs are not entitled to reimbursement of educational expenses from the time they began Matthew's home-based program in mid-January 1997 to March 21, 1997, the date of the IEP for the remainder of the 1996-97 school year.

Parents may not obtain reimbursement for the time a child is placed in private school without the permission of the school district if it is determined that the proposed IEP met the IDEA requirements. *Fort Zumwalt v. Clynes*, 119 F.3d at 614. When the school district was informed of plaintiffs' desire to change Matthew's placement, they offered the March 21, 1997, IEP which meets the IDEA requirements for a free appropriate public education. Thus, plaintiffs are not entitled to reimbursement for expenses for the 1997-98 school year.

Plaintiffs are not entitled to a reimbursement of educational expenses for the 1998-99 school year because they pursued their own program unilaterally without giving the school district an opportunity to work with them on an IEP for Matthew for that school year. No evidence has been offered or presented to this court showing the school district was presented with Matthew's accomplishments for the 1997-98 school year and that the school district was given the opportunity to develop a new IEP for 1998-99 school year.

The court finds that the administrative panel erred in ordering defendant school district to reimburse plaintiffs for ten hours of one-on-one instruction. The ten hours of instruction the panel used as a basis of this payment were already included in the proposed IEP. They were not additional hours that the panel found lacking. The IEP offered by the school district was appropriate in that it included at least sixteen hours of one-on-one instruction time. Had plaintiffs chosen to utilize the public school services offered, they would not have been put to the expense of that additional one-on-one instruction. Because they chose not to take advantage of the free appropriate public education offered by the school district, plaintiffs are responsible for any additional educational expenses which they chose to incur privately.

Every parent must make choices regarding his or her child's education. The goal of the IDEA is to make a free appropriate public education available to children of all abilities. A free

appropriate public education is available for Matthew through the Columbia Public Schools. If plaintiffs choose not to avail themselves of that opportunity, they are free, as are all parents, to provide a private education for their child at their own expense.

Procedural Issues

The court finds that plaintiffs' brief does not comply with Federal Rule 8(e) and Local Rule 7.1(f) in that plaintiffs' pleadings and suggestions are neither concise nor direct as required by the rules. Plaintiffs, at the court's request, in preparation for oral argument on their motion for summary judgment, presented to this court a list of the five most significant due process violations. The court will deal specifically with those claims. The court affirms the administrative panel's findings regarding the remaining due process issues for the reasons set forth in the panel's decision.

1. Failure of the local education authority to identify Matthew's combined conditions of autism and suspected oral apraxia. (The court notes that the remainder of plaintiffs' first issue deals with whether Matthew was offered a free appropriate public education, not violations of due process.)

Matthew was identified as a child with special needs even before he moved to Missouri at age 26 months. The Columbia School District evaluated Matthew in the summer of 1995 and he was determined to be eligible for Early Childhood Special Education. Matthew began Early Childhood Special Education through the Columbia schools as soon as he turned three years old.

Missouri does not require the use of discrete educational diagnostic categories to determine eligibility for Early Childhood Special Education for children between the ages of three and five years. While the Missouri State Plan does not require categories, plaintiffs claim the failure to catagorize Matthew as a child with educational autism is a procedural violation. A similar issue was before the federal court in an autism case in Michigan. Michigan's special education rules, similar to Missouri's, which provide children under aged five with the noncategorical diagnosis of "preprimary impaired" have been upheld. *Burlovich v. Board of Educ. of the Lincoln Consolidated Schools*, 28 IDELR 277 (W.D. Mich. 1998). This court finds no statutory or constitutional basis for declaring invalid the Missouri procedure of not placing medical labels on children so young.

Matthew was still under five years of age when he was definitively diagnosed with Pervasive Development Disorder Not Otherwise Specified. Nonetheless, until he reached age five it was appropriate, under Missouri's noncategorical scheme, to maintain his educational diagnosis of Early Childhood Special Education. Such an educational diagnosis simply means that Matthew is eligible for special educational services. The services provided must still be tailored to meet the particular developmental needs of the child. Had Matthew not been diagnosed as a child needing special educational services, his due process rights would have been violated. That is not the case here. Matthew was diagnosed at birth as a special needs child and was evaluated for special education by the Columbia School District well before he was eligible to attend preschool at age three.

The court finds that Matthew was properly identified for IDEA purposes by the Columbia School District.

2. Failure of the local educational authority to include an autism or apraxia expert with actual knowledge of Matthew on the March 1997 IEP team. (Plaintiffs' other allegations under this point relate to substantive matters, not procedural questions.)

Plaintiffs argue that an expert in early intervention services for children with educational autism should have evaluated Matthew and been on his IEP teams. Plaintiffs have provided no authority to support this argument. Under IDEA, the child's needs must be identified and a program must be developed to address those needs. 20 U.S.C. § 1414. The Act does not specify who must be on the IEP team.

Each person who evaluated, worked with, and helped design an IEP for Matthew had training or experience in working with autistic children. Dr. Donnelly, who was called in as a consultant to advise on the March 1997 IEP was an acknowledged autism expert, who also raised an autistic child. No laws or facts support plaintiffs' claim of procedural violation with respect to IEP team participants.

The court finds that there was no procedural violation with regard to the constitution of Matthew's IEP team for March 1997.

3. Obstruction to parent participation by administrative manipulation of the several meetings leading up to the March 1997 IEP. (Other issues included in this point are substantive in nature and do not comply with the court's directive to set forth procedural issues.)

The parents must receive notice and an opportunity to participate in any IEP team meeting. Plaintiffs received notice of and attended an IEP meeting for Matthew on March 4, 1997, to discuss his special education needs and placement for the 1997-98 school year. When plaintiffs provided the school district members of the team with information regarding Matthew's autism diagnosis, all members of the IEP team, including plaintiffs, agreed to continue the meeting to a later date. Plaintiffs were in no way prejudiced by continuing the IEP meeting, and they took advantage of the interim period to develop their own written list of proposed goals for the rest of the IEP team to consider before the next meeting. The continuation of the 1997-98 IEP meeting was scheduled for March 21, 1997.

In preparation for Matthew's IEP meeting, Matthew's teachers and Dr. Donnelly got together on March 20, 1997, to develop their own draft goals and objectives for Matthew, in the same manner that plaintiffs consulted with each other, without the rest of the team, to develop their draft goals. His teachers did not determine Matthew's placement on March 20, 1997. That was not done until the IEP meeting on March 21, 1997, with plaintiffs in attendance.

Not every meeting of a child's teachers is an IEP team meeting. The issue of a meeting, similar to the March 20, 1997, meeting, to prepare for an IEP meeting has been before other courts. Preparatory meetings that include developing draft IEP's do not result in procedural violations. *See G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 949 (1st Cir. 1991). One would expect that all the members of the IEP team would have prepared for the meeting ahead of time. That is what occurred in this case, both the parents and Matthew's teachers consulted among themselves ahead of time and, as a result, all the members of the IEP team were prepared to develop an educational plan for Matthew for 1997-98.

There was no evidence that plaintiffs did not receive notification of either the March 4, 1997, IEP meeting or the continuation of that meeting on March 21, 1997. The parents attended both meetings where they were active participants. Neither Matthew nor his parents were

prejudiced in any way by continuing the March 4 meeting with plaintiffs' approval, or by the March 21, 1997, meeting for which all parties had prepared in advance.

The court finds there was no procedural violation regarding the scheduling or notification for Matthew's March 1997 IEP meetings.

4. Failure of the local educational authority's IEP team to consider the recommendations of Matthew's independent evaluators.

The evidence is clear that the school district's IEP team did consider the information from Matthew's independent evaluators when developing his new IEP for 1997-98. The reason for continuing the March 4, 1997, IEP meeting was to give the school district and Matthew's teachers an opportunity to consider that information when developing the IEP, and to receive recommendations from Dr. Donnelly.

The school district did incorporate some of the parents' recommendations in their proffered IEP for Matthew for 1997-98, including an increase of instructional time, and dedicated one-on-one time for discrete trial training with Matthew.

The court finds that plaintiffs' assertion on this point is not supported by the evidence, and the evidence clearly indicates that the school district did consider the recommendations of Matthew's independent evaluators when developing the 1997-98 IEP. There was no violation of due process.

5. Failure of the local educational authority's IEP team to issue written refusal notices to the parents. (The rest of plaintiffs' allegations under this point are argumentative, not on point, and in violation of the court's directive to concisely set forth procedural violations.)

Plaintiffs do not identify any notice which should have been sent but was not. The school district offered into evidence numerous notices provided to the parents at each stage of the process, particularly with respect to the March 21, 1997, IEP. (Jt. Exhs. 11, 16, 19, 21, 24.) The district issued notices of action on March 21 and April 24, 1997 (Jt. Exhs. 3, 4). The evidence is clear that plaintiffs received all notices that were required by the law in effect at the time.

The court finds that all legally required notices were sent and there was no violation of plaintiffs' due process rights. Plaintiffs have no claim for damages for violation of their due process rights under IDEA.

Rehabilitation Act Claim

Plaintiffs have brought a claim for damages pursuant to section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The statute provides in part:

> No otherwise qualified individual in the United States, . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a). Plaintiffs' damage claims against the school district under the Rehabilitation Act must fail because the school district has offered a free appropriate public education to Matthew. *Fort Zumwalt v. Clynes*, 119 F.3d at 615; *Breen v. St. Charles R-IV Sch. Dist.*, 25 IDELR 1195 (E.D. Mo. 1997), *aff'd*, 141 F.3d 1167 (8th Cir. 1998). The implementation of an IEP developed in accordance with IDEA meets the standard under the Rehabilitation Act, 34 C.F.R. § 104.33. Plaintiffs have no claim for discrimination under the Rehabilitation Act.

Attorney Fees

Pursuant to 20 U.S.C. § 1415(e)(4)(B), a court has to award reasonable attorney fees as part of the costs to the parents or guardians of a youth who brings any action or proceeding under IDEA and are deemed the prevailing party within the meaning of the statute. A party prevails if he or she succeeded on any significant issue which achieved some of the benefit sought. *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1377 (8th Cir. 1998). Plaintiffs in this case have not prevailed on their due process claims, their substantive IDEA claim, or their Rehabilitation Act claim. The court has found that the administrative panel has erroneously awarded plaintiffs expenses for ten hours of one-on-one instruction that were already included as an integral part of the free appropriate public education offered to Matthew. Plaintiffs are not the prevailing parties in this case.

The IEP process is one where the school district and the parents are to work *together* for the best interest of the child. The court recognizes that all parties had Matthew's best interest at heart, but somehow in the IEP process, the cooperative nature of the process became confronta-

tional and driven by suspicion and distrust. As a result, substantial legal expenses have been incurred by both the parents and defendant Columbia School District in this appeal. A cooperative attitude, rather than an adversarial one, should produce a program for Matthew in which he receives a substantial amount of one-on-one education at school, paid for by the school district, and supplemented at home by the parents, at their own expense. It is this court's hope that such an attitude will prevail in developing Matthew's 1999-2000 IEP. With that hope, the court believes that the parties should bear their own expenses in this case and plaintiffs should consider whether their money would be better spent on Matthew's education or pursuing this case.

Expansion of the Record

Plaintiffs have requested the court to expand the record to include a large volume of documents espousing the Lovaas method of education for autistic children. The court finds that there is sufficient evidence in the existing record that Lovaas is an effective and perhaps the most effective method of education for some autistic children. There is no need to burden this action with additional, cumulative data regarding this particular method of education because that is not the issue in this case.

Plaintiffs have also asked the court to look beyond March 21, 1997, to include evidence of Matthew's progress in his home-based instruction. The issue in this case is whether the March 21, 1997, IEP was inappropriate as of that date. Absent some indication that the evidence was presented to the defendants in an effort to get a revised IEP, the court finds that the relevant time in this case is that prior to March 21, 1997, when the IEP was developed for and offered to Matthew.

Therefore, it is

ORDERED that the administrative panel's decision is affirmed, in part, and reversed, in part, in accordance with this order. It is further

ORDERED that plaintiffs' motion for summary judgment is denied. It is further

ORDERED that defendant Columbia 93 School District's motion for summary judgment is granted. It is further

ORDERED that plaintiffs' motion to expand the record is denied [25]. It is further

ORDERED that all parties shall pay their own costs. It is further

ORDERED that within fourteen (14) days, plaintiffs notify the court whether they wish to proceed with their claims against the Missouri Department of Elementary and Secondary Education.

Dated this _____ day of June, 1999, at Jefferson City, Missouri.

/s/

WILLIAM A. KNOX
United States Magistrate Judge

APPENDIX I

Goal 1: Develop functional self-care skills to maximize independence in school environment.

- Objective A: Remove coat independently with assistance with closures.
- Objective B: Participate in regular classroom routine using adaptive methods and equipment in consultation with occupational therapist as needed.
- Objective C: Gradually replace self-stimulating behavior by participating in structured purposeful activities.
- Objective D: Taste the snack of the day.
- Objective E: Demonstrate increased independence in self-care by following an individual visual schedule daily with prompting.

Goal 2: Develop pre-academic skills to maximize learning.

- Objective A: Maintain one-on-one and group-structured activities throughout the day.
- Objective B: Attend to teacher-selected tasks to completion with minimal prompting.
- Objective C: Choose between two teacher-selected activities.
- Objective D: Trace shapes beginning with a circular line as demonstrated.
- Objective E: Imitate shapes beginning with a circular line.
- Objective F: Improve functional imitative skills through games, classroom routine, and one-on-one activities.
- Objective G: Independently do a 3 to 5-piece puzzle.
- Objective H: Independently build a 5 to 8-block tower.

Goal 3: Expand repertoire of appropriate play behaviors and social skills.

- Objective A: Demonstrate appropriate play using twenty different toys.
- Objective B: Demonstrate cooperative play through activities such as rolling a ball back and forth with another child.
- Objective C: Participate in activities to encourage development of motor skills in area of balance, locomotor skills, strength and endurance, and bilateral motor coordination to promote independence.

Goal 4: Improve communication.

- Objective A: Consistently use verbalizations, signs, and pictures to express needs to peers and adults in a variety of situations, parents will communicate a list of targeted words to school staff.
- Objective B: Consistently complete the following one-step directives: “stand up,” “look at me,” “pick up the toy,” “come here,” and “hands quiet.”
- Objective C: Consistently complete two-step directive with decreasing prompts.
- Objective D: Identify by gesturing ten to twenty objects in classroom environment; parents will communicate a list of targeted objects to school staff.